IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

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No. ~~1107~~ 8

UNITED STATES OF AMERICA,

Appellant,

v.

EUGENE FRANK ROBEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

MOTION TO AFFIRM

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MOTION TO AFFIRM

Eugene Frank Robel, appellee, moves to affirm the judgment of the United States District Court for the Western District of Washington, Northern Division, dismissing the indictment herein. The ground for this motion is that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion below (Appendix A, *infra*) has not yet been officially reported.

JURISDICTION

The indictment charges appellee with violating section 5(a)(1)(D) of the Subversive Activities Control Act (herein called the Act), 50 U.S.C. 784(a)(1)(D). The District Court dismissed the indictment on October 4, 1965, on the ground that it does not charge a violation of section 5 of the Act, as interpreted by the court, or alternatively that section 5 is unconstitutional.

On November 2, 1965, the government filed a notice of appeal to the Court of Appeals for the Ninth Circuit. On February 28, 1966, the Court of Appeals granted the government's unopposed motion to certify the case to this Court pursuant to 18 U.S.C. 3731. The case was docketed in this Court on March 10, 1966.

Jurisdiction of the appeal is conferred on the Court by 18 U.S.C. 3731. The following cases sustain the Court's jurisdiction. *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86; *United States v. Sampson*, 371 U.S. 75; *United States v. Braverman*, 373 U.S. 405; *United States v. Mersky*, 361 U.S. 431.

STATUTES INVOLVED

The pertinent provisions of the Subversive Activities Control Act are set forth in Appendix B.

QUESTIONS PRESENTED

1. Whether the indictment charges a violation of section 5(a)(1)(D) of the Act as properly interpreted.

2. If question 1 is answered in the affirmative, whether section 5(a)(1)(D) is constitutional.

STATEMENT

The one-count indictment[1] charges appellee with the offense of engaging in employment in a "defense facility" in violation of section 5(a)(1)(D) of the Act.

Section 5 of the Act provides that when a Communist-action or Communist-front organization[2] registers or is required by a final order of the Subversive Activities Control Board (herein called the Board) to register under the Act, the members of the organization become subject to various prohibitions with respect to employment in the federal government, labor unions and "defense facilities." Section 5(a)(1)(D) provides that if the organization in question is a Communist-action organization, its members may not engage in any employment in a "defense facility." Violations of section 5 are punishable by imprisonment for five years and fine of $10,000. Sec. 15(b).

A Communist-action organization is defined by section 3(3) of the Act as an organization which is controlled by the unnamed foreign government controlling the world Communist movement and which operates primarily to advance the objectives ascribed to this movement by section 2. A defense facility is defined as any establishment or enterprise which the Secretary of Defense designates as a defense facility for the purposes of the Act and which posts notices of the designation. Secs. 5(b) and 3(7).

The indictment alleges that:

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[1] The indictment is set forth verbatim in the opinion below, Appendix A, *infra*.

[2] The section uses the term "Communist organization," defined in section 3(5) to include Communist-action, Communist-front and Communist-infiltrated organizations. Since the last are not required to register under the Act, section 5 is inapplicable to their members.

1. A final order of the Subversive Activities Control Board requiring the Communist Party to register as a Communist-action organization has been in effect since October 21, 1961.[3]

2. On August 20, 1962, the Secretary of Defense designated the Todd Shipyards Corporation, Seattle Division, as a defense facility, and notices of the designation have been posted about the plant.

3. Since November 19, 1962, the appellee has unlawfully and wilfully engaged in employment in the plant while a member of the Communist Party with knowledge and notice both of the final registration order and of the designation of the plant as a defense facility.

The District Court withheld decision on appellee's motion to dismiss the indictment pending this Court's disposition of *Aptheker v. Secretary of State*, 378 U.S. 500 and *United States v. Brown*, 381 U.S. 437. Thereafter, the motion was granted.

The opinion accompanying the court's order ruled that the indictment fails to charge an offense against the United States because it does not allege that appellee "was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes." The conclusion that the absence of these allegations is fatal to the indictment is compelled, the court held, by the decisions in *Aptheker*, *Brown*, *Scales v. United States*, 367 U.S. 203, and *Noto v. United States*, 367 U.S. 290. The court recognized that section 5(a)(1)(D) does not in terms make active and knowing membership or specific intent an element of the offense. It ob-

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[3] The Board's order became final under section 14(b) of the Act ten days after the issuance of the mandate of the Court following affirmance of the order in *Communist Party v. S.A.C.B.*, 367 U.S. 1, rehrg. den., 368 U.S. 871.

served that, "This omission may ultimately serve to render [the section] unconstitutional as it did with respect to section 6 of the Act (50 U.S.C. § 785). *Aptheker v. Secretary of State, supra,* at page 511, footnote 9."

ARGUMENT

I.

Aptheker v. United States Establishes That the Provision of the Act Under Which the Indictment Is Laid Violates Substantive Due Process and Cannot Be Saved by Interpretation.

Legislation disqualifying defined classes of individuals from particular types of employment is subject to due process limitations. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy,* 360 U.S. 474, 492, and cases there cited.

Aptheker v. United States, supra, invalidated section 6 of the Act, forbidding members of Communist-action organizations to apply for or use passports, as a denial of due process because it placed over-broad and hence unreasonable restrictions on the right to travel abroad. The rationale of *Aptheker* establishes that section 5, which makes it a crime for members of Communist-action organizations to hold employment in defense facilities, is a similar denial of due process.

Aptheker held that section 6 was condemned by the following considerations:

1. The section applies to all members having knowledge or notice of the issuance of a final registration order against the organization. It thus applies to members who do not know or believe that, in fact, the organization is a Communist-action organization or operates to fur-

ther the aims of the world Communist movement (pp. 509-10). "The provision therefore sweeps within its prohibition both knowing and unknowing members" (p. 510).

2. "Section 6 also renders irrelevant the member's degree of activity in the organization and his commitment to its purpose" (p. 510).

3. "The prohibition of § 6 applies regardless of the purposes for which an individual wishes to travel" and "regardless of the security-sensitivity of the areas in which he wishes to travel" (pp. 511, 512).

4. "Congress has within its power 'less drastic' means of achieving the Congressional objective of safeguarding our national security" (pp. 512-13).

Each of these considerations applies with equal force to section 5(a)(1)(D). It requires no scienter except knowledge or notice of the issuance of a final registration order and the designation of the defense facility. It thus forbids employment to members who have no knowledge of the alleged nature or purpose of the organization, are not active in its affairs, do not share its supposed seditious purposes, and are themselves innocent of wrongdoing. Accordingly, to paraphrase *Aptheker* (at 511), the section "establishes an irrebutable presumption that individuals who are members of the specified organizations will," if employed in a defense facility, "engage in activities inimical to the security of the United States."

Again, section 5 is analogous to section 6 in that it applies without regard to the security-sensitivity of the member's job. The indictment does not allege the nature of appellee's employment in the Todd Shipyard, and this is irrelevant under section 5. Once a plant is designated as a defense facility under sections 3(7) and 5(b), it becomes unlawful under section 5(a)(1)(D) for a member of a proscribed organization to hold *any* job therein, including one which is plainly nonsensitive. Moreover, section 5(b) gives the Secretary of Defense absolute authority to

designate "defense facilities," and thereby drastically to curtail the employment opportunities of members of proscribed organizations. And this unreviewable authority is given notwithstanding that the statutory standard — what "the security of the United States requires" — is so vague and subjective as to invite abuse.

Finally, as even the much-criticized Federal Employee Loyalty Program demonstrates, means less drastic than section 5 were available to safeguard security-sensitive employment. See *Aptheker*, at 513.

Accordingly, section 5, like section 6, "judged by its plain import and by the substantive evil which Congress sought to control sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment." *Aptheker*, at 514.[4] Indeed, *Aptheker* plainly indicated that section 5 is unconstitutional on this ground. For in distinguishing section 6 of the Act from section 9 (h) of the Taft-Hartley Act, the Court stated (at 513, n. 11): "Although the requirement [of sec. 9(h)] undoubtedly discouraged unions from choosing officers with Communist affiliations, it did not . . . affect basic individual rights to work."

Aptheker establishes that section 5 is not only unconstitutional as written but that it cannot be saved by interpretation. The Court there refused (at 511, n. 9 and 515-17) to read the elements of knowledge, intent and active membership into section 6 or to limit its application to Communist Party leaders. The reasons for its refusal are dispositive of the question with respect to section 5.

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[4] *Aptheker* answers the argument that a member of the Communist Party may free himself from the sanctions of section 5 by abandoning his membership. It states (at 507, fn. omitted): "Since freedom of association is itself guaranteed by the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in the given association."

Moreover, even if it were possible to save section 5 in this manner, dismissal of the indictment would still be required for its failure to allege all elements of the offense charged. *United States v. Carll*, 105 U.S. 611; *Morrissette v. United States*, 342 U.S. 246, 270, n.11.

II.

The Indictment Fails To Charge a Violation of Section 5(a)(1)(D) Because It Is Based on the Government's Erroneous Interpretation of the Section as Not Making It an Element of the Offense That the Communist Party Is in Fact a Communist-action Organization.

The indictment alleges that a final order is in effect requiring the Communist Party to register as a Communist-action organization. It does not, however, allege that the Communist Party is in fact a Communist-action organization. Yet, as we show below, section 5(a)(1)(D) of the Act makes the existence of the latter fact an element of the offense, and the government's contrary interpretation of the section is plainly erroneous. Accordingly, the failure to allege that the Communist Party *is* a Communist-action organization is fatal to the indictment. Rule 7(c), Federal Rules of Criminal Procedure; *Hagner v. United States*, 285 U.S. 427, 433.

The court below did not rely on this ground for dismissing the indictment. Since, however, the issue turns on an interpretation of the statute on which the indictment was founded, it is open for consideration on this appeal. *United States v. Wiesenfeld Warehouse Co.*, *supra*, at 92.

A. The Government's Interpretation of Section 5(a)(1)(D) Is Contrary to Its Text.

Section 5 provides that "[w]hen *a Communist organization*, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the

Board requiring *such* organization to register," it becomes unlawful for the members of the organization to engage in specified conduct. It is apparent from the quoted text that a person can be guilty of violating section 5 only if two conditions are satisfied with respect to the organization of which he is a member. The organization (1) must be a Communist organization as defined in section 3(5),[5] and (2) must have registered or have been ordered to register.

The conclusion that neither the registration of an organization nor a final order that it register dispenses with the necessity of proving its character in prosecutions of members of the organization under section 5(a)(1)(D) is confirmed by the text of that sub-section. It provides that "if such organization[6] *is* a Communist-action organization," it shall be unlawful for the members to hold jobs in defense facilities. Had Congress intended to make a final order requiring an organization to register as a Communist-action organization conclusive of its character for the purposes of section 5(a)(1)(D), it could easily have said so. Instead, Congress predicated criminal liability of a member, not only on what the organization is found by the Board to be, but on what it "is," and thereby made the existence of the fact as well as of the finding an element of the offense.

An examination of other criminal provisions of the Act shows that Congress deliberately worded section 5 so as to make the fact that the organization "is" a Communist-action organization an element of the offenses. For an additional provision is similarly worded while the others

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[5] Section 3(5) defines Communist organizations as including Communist-action and Communist-front organizations and thus incorporates by reference the section 3(3) and 3(4) definitions of these organizations.

[6] I.e., a Communist organization which has registered or is required by a final order to register.

predicate criminal liability solely upon the fact that the organization has registered or has been finally ordered to do so.

Thus, section 6(a) provides that, "[w]hen *a Communist organization* as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring *such* organization to register;" it shall be unlawful for members of the organization to apply for or use passports. The quoted words are identical with the introductory words of section 5 and, like the latter, make proof that the organization is in fact a Communist organization prerequisite to the conviction of a member.

Section 6(b), however, is worded differently. It provides that "[w]hen *an organization* is registered, or there is in effect a final order of the Board requiring *an organization* to register, as a Communist-action organization," it shall be unlawful for a federal employee to issue a passport to a person whom he knows or believes to be a member. Thus, section 6(b), unlike 6(a) and 5(a)(1)(D), dispenses with proof of the actual character of the organization, and makes proof of the fact of its registration or the issuance of a final registration order sufficient. This is likewise the case with section 10 which punishes violation of the labelling requirements of the Act.[7] Again, section 15(a), punishing the failure to register in obedience to a registration order, does not require proof of the character of the organization but only that it has been ordered to register.

It is apparent from the comparative wording of section 5(a), 5(a)(1)(D) and 6(a), on the one hand, and sections 6 (b), 10 and 15(a), on the other, that Congress was aware of the difference between requiring proof of the fact that an organization is of a specified character and proof of

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[7] The civil sanctions of section 11 (denial of tax deductions and exemptions) are similarly worded.

the fact that it has been found by an administrative agency to be of such character. Whatever its reasons may have been, Congress made the existence of both facts elements of the offense under section 5(a)(1)(D).[8] This conclusion, which follows from the wording of the section, is compelled by the principle that criminal statutes are to be strictly construed. Cf. *Yates v. United States*, 354 U.S. 298, 310-11.

B. The Government's Interpretation of Section 5(a)(1)(D) Is Precluded by Constitutional Considerations.

"The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative . . . Judicial abstention is especially wholesome where we are considering a penal statute. Our policy in constitutional cases is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation." *United States v. Five Gambling Devices*, 346 U.S. 441, 448-49. Accordingly, the Court has not infrequently strained the words of a statute in order to avoid a serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47.

Here, as will be shown, the government's interpretation of the statute presents weighty constitutional questions. On the other hand, as we have seen, no straining of the words of the statute is required to avoid these questions.

Procedural due process.

The only possible justification for invoking the sanctions of section 5 against appellee on account of his alleged membership in the Communist Party is that the latter is a Communist-action organization as defined in the Act.

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[8] The legislative history throws no light on Congress' reasons for so doing.

Nevertheless, as the government interprets the section and has drafted the indictment, the character of the Party is not litigable in the criminal proceeding. Instead, appellee is concluded on this issue by the order requiring the Party to register as a Communist-action organization.

Appellee was not a party to the proceeding in which the Communist Party was found to be a Communist-action organization and ordered to register as such.[9] And the Act provides no procedure which would permit appellee to challenge this finding unless he may do so in his prosecution under section 5. Accordingly, if the government's interpretation of section 5 is correct, the Act denies appellee due process by subjecting him to deprivation of his liberty and property without a hearing at which he may contest the factual premise on which the validity of the deprivation depends. *United States v. Carolene Products Co.*, 304 U.S. 144, 152; *Noto v. United States*, 367 U.S. 290, 299; *Renaud v. Abbott*, 116 U.S. 277, 288. Cf. *Kirby v. United States*, 174 U.S. 47.

The due process defect inherent in the government's interpretation of section 5 is aggravated by the fact that the determination of the character of the Communist Party which, as the indictment charges, concludes appellee was made in 1953,[10] ten years before the return of the indictment. To preclude appellee from contesting the continuing validity of this stale determination would violate the due process principle that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that

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[9] In accordance with section 13(a) of the Act, the proceeding was brought against the Communist Party alone. See *Communist Party v. S.A.C.B.*, *supra*.

[10] See *Communist Party v. S.A.C.B.*, *supra*, at 19-20.

those facts have ceased to exist."[11] *United States v. Carolene Products Co., supra,* at 153; *Chastleton Corporation v. Sinclair,* 264 U.S. 543; *Baker v. Carr,* 369 U.S. 186, 214.

The government will doubtless argue that appellee is afforded due process by sections 13(b) and (i) of the Act which permits a *registered* organization to obtain a Board order canceling its registration upon a showing that it is no longer a Communist-action organization. This procedure, even if adequate to protect appellee, is not available. For the Communist Party has not registered, and is still litigating the contentions, held premature in *Communist Party v. S.A.C.B., supra,* that it cannot constitutionally be required to do so. See *Communist Party v. United States,* 331 F.2d 807, cert. den., *377 U.S. 968; Communist Party v. United States,* Nos. 19880 and 19881, C.A.D.C. Obviously, appellee's constitutional rights may not be denied because the Communist Party has elected to assert its own.

Attainder

Section 5 as interpreted by the government, is a bill of attainder. Unlike the statute invalidated in *United States v. Brown,* 381 U.S. 437, section 5 does not identify the Communist Party by name but delegates to the Board the function of identifying the organization which satisfies the Act's definition of a Communist-action organization. But the difference is immaterial if the government's interpretation of section 5 is accepted. For that interpretation precludes appellee from challenging the continuing

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[11] The more so here because, as the Chief Justice observed (at 134 n.11), the Board's determination was itself based on a presumption of continuity which "is certainly dubious" as applied to "stale evidence" of Party activity prior to 1940. And cf. *American Committee for Protection of Foreign Born v. S.A.C.B.,* 380 U.S. 503, and *Veterans of Abraham Lincoln Brigade v. S.A.C.B.,* 380 U.S. 513.

subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

United States v. England, supra, relied on Justice Jackson's opinion in rejecting the government's contention that the Internal Revenue Code should be construed as making the Commissioner's determination that a taxpayer had received taxable income conclusive of that fact in a prosecution of the taxpayer for failing to report the income. The government's interpretation of section 5 must likewise be rejected since it too would submit the "vital and controversial part" of the charge against appellee — the character of the Communist Party — to conclusive administrative determination.[15]

It will be argued that the government's interpretation of section 5 should prevail because it would be impractical to permit relitigation of the status of the Communist Party in each prosecution under the section. But it is only in "rare and exceptional circumstances" that the literal meaning of a statute will be disregarded, even when it seems to lead to an absurd result. *Crooks v. Harrelson,* 282 U.S. 55, 60. There is nothing absurd about a literal interpretation of section 5. And it is no more impractical to require proof of the character of the Communist

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[15] Justice Jackson's opinion is not contrary to *Yakus v. United States*, 321 U.S. 414, holding that Congress may penalize the violation of administrative rules of general application and provide that the validity of the latter may not be challenged in a prosecution for the violation. The distinction, pointed out by Justice Jackson (at 179), is between rule-making and the power of adjudication. Nor is the opinion contrary to *Cox v. United States*, 332 U.S. 442, holding that the denial of a draft exemption is conclusive in a prosecution for draft evasion. A draft exemption is an exceptional privilege, not constitutionally required in the exercise of the war power, which the government may withhold substantially on its own terms. But where criminal liability may constitutionally be imposed only if certain facts exist, the existence of the requisite facts must be determined in the criminal proceeding, and not administratively.

Party in each prosecution under that section than to require similar proof in each prosecution under the membership clause of the Smith Act. See *Scales v. United States*, 367 U.S. 203 and *Noto v. United States*, 267 U.S. 290. As the latter stated (at 299):

> "The kind of evidence which we found in *Scales* sufficient to support the jury's verdict of present illegal Party advocacy is lacking here in any adequately substantial degree. It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party."

CONCLUSION

The motion to affirm should be granted.

Respectfully submitted,

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